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No. 85-1264

In The
Supreme Court of the United States
October Term, 1985

PATRICIA A. LAVANT,
Plaintiff-Petitioner,
v.
GEORGIA LIONS EYE BANK, INC.,
Defendant-Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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QUESTION PRESENTED FOR REVIEW

May a Writ of Certiorari be obtained for review of a state court decision when:

(1) No federal question was ruled upon by the state courts; and

(2) Any federal question that may exist was raised before the appellate court for the first time in a petition for rehearing.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Contents	ii
Table of Authorities	iii
Statement of the Case	1
Summary of Argument	2
Argument	2
I. No Federal Question Has Been Ruled Upon By The Georgia State Courts And Thus This Court Has No Jurisdiction Over This Case.	2
II. Any Federal Question Which Was Presented To The Georgia Supreme Court Was Not Asserted In A Timely Fashion.	4
Conclusion	5

TABLE OF AUTHORITIES

Page

CASES:

Bloeth v. State of New York, 82 S.Ct. 661 (1962, U.S.) 4

Cardinale v. Louisiana, 394 U.S. 437 (1969) 4

Estate of Wilson v. Aiken Industries, Inc., cert. denied, 439 U.S. 877 (1978) (Justice Blackmun, concurring) 4

Herndon v. State of Georgia, 295 U.S. 441, 443 (1935) 4

Webb v. Webb, 451 U.S. 493, 496-97 (1981) 4

STATUTES:

28 U.S.C. § 1257(3) 2

STATEMENT OF THE CASE

In an order entered on October 5, 1984 on Respondent St. Joseph's Hospital's Motion for Summary Judgment, David R. Elmore, Judge of the State Court of Chatham County, Georgia ruled that Official Code of Georgia Annotated § 31-23-6(b), commonly referred to as "the Medical Examiner's law," was unconstitutional. Judge Elmore based his ruling solely upon the Due Process clause of the Georgia Constitution. In a subsequent order on cross-motions for summary judgment of Petitioner Patricia Lavant ("Lavant") and Respondent Georgia Lions Eyebank, Inc. ("Georgia Lions Eyebank") Judge Elmore reaffirmed his previous order and again found the statute unconstitutional. Georgia Lions Eyebank, Inc. is a non-profit corporation and has no parent or subsidiary corporations.

The issues presented to the Georgia Supreme Court on appeal, as stated by the Georgia Lions Eyebank, were: (1) "does the Medical Examiner's law unconstitutionally deprive plaintiff of any vested right in violation of the Due Process clause of the Georgia Constitution; and (2) did the legislature act within its police power in enacting the Medical Examiner's law." Page 7 of Appellant's Brief to the Georgia Supreme Court.

In her brief to the Georgia Supreme Court, Lavant stated that the issues presented were: (1) "whether appellee held a property interest in the body of her deceased son sufficient to invoke the protection of the Georgia Constitution's Due Process clause and (2) whether the trial court correctly denied appellants' motions for summary judgment where appellants unconstitutionally deprived

appellee of her property interest without prior notice or consent." Page 4 of Lavant's Brief to the Georgia Supreme Court.

No federal question was presented to the Georgia Supreme Court until Lavant moved for a rehearing of the Supreme Court's decision entered on October 9, 1985. The motion for rehearing was denied without opinion.

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SUMMARY OF ARGUMENT

Neither the trial court nor the Supreme Court of Georgia ruled upon the federal constitutional question that Petitioner Patricia Lavant raises in her Petition for Writ of Certiorari. In fact, no federal question was raised in the state appellate process until Lavant moved for rehearing, which was denied. Under such circumstances, this Court lacks jurisdiction and the Writ should be denied.

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ARGUMENT

I. No Federal Question Has Been Ruled Upon By The Georgia State Courts And Thus This Court Has No Jurisdiction Over This Case.

The Petition for Writ of Certiorari should be denied because there has been in this action no ruling on a federal question. Until such a ruling occurs, this court has no jurisdiction to hear the matter. 28 U.S.C. § 1257(3) (1982).

The federal constitutional issue was raised in passing by Lavant in her reply to Respondent, St. Joseph's Hospital's motion for summary judgment. The federal constitutional issue, however, was never ruled upon. In its order declaring the Medical Examiner's law unconstitutional, the court relied solely upon the Georgia Constitution. The court stated "[o]ur inquiry proceeds under the Georgia Constitution . . . . We see no need to resort to the ultraflexible interpretations given to the Fourteenth Amendment to the Federal Constitution." Lavant's Brief Appendix B, Page 10a.

After the court's ruling, Lavant and the Georgia Lions Eyebank filed cross-motions for summary judgment. In its second order, the court reaffirmed the reasoning of the first order and again found the statute unconstitutional. Lavant's Brief Appendix C, Page 12a. No reference was made to the federal constitution in the second order.

When the case was appealed, the Georiga Lions Eyebank and St. Joseph's Hospital stated in their briefs that only Georgia constitutional issues were raised. Lavant did not object to that limitation and, in fact, stated in her brief that the issue before the Court was whether she was entitled to invoke the Due Process clause of the Georgia Constitution. Lavant's brief made no reference to the Federal Constitution and cited no federal cases. In short, the only issues presented to the Georgia Supreme Court were questions arising under the Due Process clause of the Georgia Constitution. The court ruled that "in Georgia, there is no constitutionally protected right in a decedent's body." Lavant's Brief Appendix A, Page 2a.

It is evident from the foregoing facts that since the trial court did not address the federal question and no federal question was originally presented to the Georgia Supreme Court, no state court has ruled on a federal question in this case. Accordingly, there can be no basis for jurisdiction in this Court.

> It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.

Webb v. Webb, 451 U.S. 493, 496-97 (1981); accord, *Cardinale v. Louisiana*, 394 U.S. 437 (1969).

II. Any Federal Question Which Was Presented To The Georgia Supreme Court Was Not Asserted In A Timely Fashion.

While no federal question was presented to the Georgia Supreme Court prior to its decision, Lavant in her motion for rehearing did raise a federal constitutional issue. By that time, it was too late. As stated in *Herndon v. State of Georgia*, 295 U.S. 441, 443 (1935), "The long established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it."; *see also, Estate of Wilson v. Aiken Industries, Inc., cert. denied*, 439 U.S. 877 (1978) (Justice Blackmun concurring); *Bloeth v. State of New York*, 82 S.Ct. 661 (1962, U.S.) (Application for stay of execution denied because matters proposed for review not raised until motion for reargument).

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CONCLUSION

The record below establishes that this Court has no jurisdiction over this matter. Therefore, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted, this 3rd day of March, 1986

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